UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC. and MICHAEL CUDA, an individual	NLRB Case No. 12-CA-25764

BRIEF AMICUS CURIAE OF CHANGE TO WIN IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS

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INTRODUCTION

Pursuant to the Executive Secretary's June 16, 2011 Notice and Invitation to File Briefs, amicus Change to Win, a federation of four national and international labor unions that collectively represent more than 5.5 million working men and women, respectfully submits this brief in support of the General Counsel's modified exceptions to the ALJD.[1/]

For the reasons set forth below and in the amicus brief previously submitted by Change to Win member union Service Employees International Union ("SEIU") *et al.* on March 25, 2011 (and accepted for filing on May 18, 2011), Change to Win urges the Board to answer "yes" to the question upon which the Executive Secretary requested briefing:

> Did the Respondent [D.R. Horton, Inc.] violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action?

SUMMARY OF ARGUMENT

Based on the analysis presented in SEIU's previous amicus brief (which we incorporate by reference herein, rather than repeating the legal arguments already made), the Board should reverse the decision of Administrative Law Judge William Cates and rule that respondent D.R. Horton, Inc. violated Sections 7 and 8(a)(1) by implementing a workplace policy that prohibits employees from pursuing any employment action in any forum on a class, collective, or joint action basis. Nothing in the Supreme Court's May 2011 decision in *AT&T Mobility LLC v.*

[1/] The General Counsel filed timely exceptions on March 14, 2011, and withdrew one of those exceptions (Exception No. 10) on June 16, 2011.

Concepcion, 131 S. Ct. 1740 (2011), undermines that analysis. If anything, *AT&T Mobility* strengthens the General Counsel's and SEIU's arguments, because that decision now makes it clearer than ever that the practical consequence of an employer's class action prohibition is necessarily to chill and restrain its workers' exercise of concerted Section 7 rights.

In light of *AT&T Mobility*, workers can no longer rely on state unconscionability law as they did before in trying to challenge in federal court the enforceability of their employer's class action prohibitions. Consequently, *AT&T Mobility* makes it even more likely that an employer with a policy of prohibiting concerted legal actions will be able to accomplish its goal of depriving workers of their right to join together to pursue workplace claims, even without having to couple that policy with a threat of discipline for any violation. An employer that prohibits such concerted legal actions therefore interferes with, restrains, and coerces its workers in their exercise of protected Section 7 rights, in violation of Section 8(a)(1) of the Act.

INTEREST OF THE AMICUS

Change to Win is a federation of four national and international labor unions – the International Brotherhood of Teamsters, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers – that collectively represent more than 5.5 million working men and women throughout the country. Many of the workers represented by Change to Win unions are employed in low-wage industries, and have little or no bargaining power.

Change to Win's Constitution sets forth several institutional objectives that are directly implicated in this case, including promoting "fairness at work," seeking to "ensure equal opportunity and rights for all women and men of every race, religion, ethnicity, age, sexual

orientation, ability, gender identity and expression, national origin and immigration status," and "fight[ing] for fair treatment and legal protection for immigrant workers in this country." In furtherance of these objectives, Change to Win and its member unions strongly oppose efforts by employers like D.R. Horton to strip workers of their Section 7 right to file or participate in concerted legal actions to improve workplace conditions and to secure employment law rights.

For many years, the Board has held that Section 7 guarantees workers the right to act concertedly by pursuing legal claims against their employers on a class action or joint action basis. *See, e.g., Harco Trucking, LLC*, 344 NLRB 478, 481 (2005); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980); *Novotel New York*, 321 NLRB 624, 633 (1996); *Auto. Club of Michigan*, 231 NLRB 1179, 1181 (1977). Change to Win submits this amicus brief to support the Acting General Counsel in his efforts to ensure that these precedents are followed and properly applied to the facts of this case.

FACTUAL BACKGROUND

D.R. Horton has a workplace policy that prohibits employees from joining together to litigate or arbitrate any workplace-related claim on a joint, class, or collective action basis. Imposed "[a]s a condition of employment" and incorporated into D.R. Horton's mandatory pre-dispute arbitration agreement that all employees must sign to obtain or keep their jobs, *see* Joint Exhibit ("JX") 2, ¶1, the employer's policy requires arbitration of any and "all disputes and claims" between the company and its employees, and further provides that "the arbitrator [1] will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee, [2] may hear only Employee's individual claims and [3] does not have the authority to fashion a proceeding as a class or collective action or to

award relief to a group or class of employees in one arbitration proceeding." JX 2, ¶¶1, 6.

ARGUMENT

SEIU has already demonstrated why, under settled Board law, workers have a Section 7 right to collectively file and pursue workplace claims. SEIU Amicus Br. at 6-9 and cases cited; *see also* ALJD at 4 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Harco Trucking, LLC*, 344 NLRB 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005)). SEIU has also shown why, under existing Board precedent, D.R. Horton's explicit prohibition against such concerted legal activity interferes with, restrains, and coerces its workers' exercise of Section 7 rights in violation of Section 8(a)(1), and why that prohibition necessarily chills workers' exercise of protected Section 7 rights by imposing enormous legal and practical burdens on any worker who might even consider defying that prohibition by joining with co-workers to file a legal claim on a concerted action basis. *See* SEIU Amicus Br. at 9-13 (explaining why employees would face substantial difficulties in pursuing a collateral challenge to the validity of a class action prohibition in court).

Although SEIU submitted its amicus brief before *AT&T Mobility* was decided, that decision does not undermine the conclusion that D.R. Horton's policy violates Sections 7 and 8(a)(1). If anything, *AT&T Mobility* makes the Charging Party's and Acting General Counsel's arguments even stronger than before.

I. Class Action Prohibitions Violate Section 8(a)(1) Even If Not Coupled with Discipline or Threat of Discipline for Defying that Prohibition

The SEIU has shown that the former General Counsel was wrong in concluding in General Counsel Memorandum 10-06, "Guideline Memorandum Concerning Unfair Labor

Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies" (June 16, 2010), that an employer's prohibition against class action arbitration violates Sections 7 and 8(a)(1) only if coupled with actual discipline or a threat to discipline any worker who defies the prohibition by filing a class action and challenging the enforceability of the class action prohibition in court. *See* SEIU Amicus Br. at 9-13, 24-31. That conclusion was wrong when the former General Counsel wrote his memorandum, and it is even more clearly wrong now that the Supreme Court has decided *AT&T Mobility*.

Any workplace policy that explicitly prohibits the exercise of Section 7 rights violates the NLRA, even in the absence of employer enforcement, as the Board has repeatedly held. In *Lafayette Park Hotel*, 326 NLRB 824 (1998), for example, the employer announced a new workplace policy prohibiting workers from making "false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees" and requiring workers immediately to leave the premises after their shift and not to return until the start of their next shift. As explained in the Board's ruling, the General Counsel alleged that these "unacceptable conduct" rules violated Section 7 and Section 8(a)(1) on their face, because they would have the effect of chilling protected rights:

> [The General Counsel did] *not* contend that the rules were initiated in response to any union and/or protected concerted activity or that any employee ha[d] been disciplined under the rules for engaging in union and/or protected concerted activity. The General Counsel's theory of the violation is that by maintaining the rules the Respondent has violated and continues to violate Section 8(a)(1) because the rules interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

Id. at 825 (emphasis in original). The Board agreed with this analysis, concluding that "the mere maintenance of rules such as those at issue here violates Section 8(a)(1)" because the very

existence of those rules "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Id*. Where unlawful workplace "rules are likely to have a chilling effect on Section 7 rights, an employer's maintenance of those rules constitutes an unfair labor practice, *even absent evidence of enforcement*." *Id*. (emphasis added).

The Board has frequently applied this principle to conclude that an employer's promulgation of a workplace rule explicitly barring concerted activity, by itself, unlawfully chills the exercise of protected rights. The analysis "begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (emphasis in original). If it does – as D.R. Horton's prohibition against joint, class, and collective actions does here – the Board "will find the rule unlawful" without having to undertake any further inquiry into whether that rule had an actual chilling effect. *Id*. at 646 & n.5 (explaining that, "[f]or example, a rule prohibiting employee solicitation, which is not by its terms limited to working time, would violate Sec. 8(a)(1) under this standard, because the rule explicitly prohibits employee activity that the Board has repeatedly found to be protected by Sec. 7"); *Ashley Furniture Indus. Inc.*, 353 NLRB No. 71, 2008 WL 5427716, at *9-11 (2008) (affirming ALJ ruling that instruction to employees not to discuss with each other that their work permits had expired or that they had received a social security no-match letter violated Sections 7 and 8(a)(1) because "gags of confidentiality are overbroad regardless of whether the rule was enforced or discriminatorily motivated").

Even if a workplace rule does not *explicitly* prohibit Section 7 activity, moreover, it will still violate the NLRA if it could reasonably be construed by employees as prohibiting such activity. *See Tecumseh Packaging Solutions*, 352 NLRB 694, 694 (2008) (employer violated

Sections 7 and 8(a)(1) by "promulgating and maintaining" a no-loitering-after-hours rule); *KSL Claremont Resort Inc.*, 344 NLRB 832, 832 (2005) ("Respondent violated Section 8(a)(1) of the Act by its . . . issuance and subsequent maintenance of a rule prohibiting 'negative conversations' about associates or managers" in a case where there were no allegations about whether the rule was enforced); *Guardsmark, LLC*, 344 NLRB 809, 809-11 (2004) (employer violates Sections 7 and 8(a)(1) by maintaining rules that prohibit complaining about employer to customers and solicitation while in uniform; no discussion about whether the rules were ever enforced).[2/]

Under established Board precedent, then, the fact that D.R. Horton has an explicit rule prohibiting all joint, class, and collective actions is itself sufficient to establish a violation of Section 8(a)(1). In addition, the practical consequences of *AT&T Mobility* are such that the mere promulgation of such a policy will necessarily have a significant chilling effect. After all, workers who wish to exercise their Section 7 rights in the face of D.R. Horton's class action prohibition now must not only breach their employment contracts and violate an explicit workplace policy in order to exercise those rights, but they must do so knowing that any unconscionability-based challenge to their employer's class action prohibition is likely to be rejected. Contrary to the position of the former General Counsel, it should make no difference whether or not an employer has chosen to supplement the chilling impact of its class action prohibition by adding an additional, gratuitous threat of discipline for those who violate it,

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[2/] *See also Cintas Corp. v. NLRB*, 482 F.3d 463, 467-69 (D.C. Cir. 2007) (affirming NLRB's holding that confidentiality rule that could be read by employees as prohibiting discussion of working conditions violates Sections 7 and 8(a)(1) regardless of whether any employee had ever actually interpreted it to bar Section 7 activity and regardless of whether it had ever been enforced against the exercise of Section 7 activity); *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007).

because the employer's explicit prohibition by itself is sufficient to "interfere with, restrain, or coerce" the exercise of protected rights. Surely an employer cannot immunize itself from Section 8(a)(1) liability simply by coupling its unlawful class action prohibition with a promise that any worker who defies that prohibition in the face of *AT&T Mobility* will not be disciplined for his or her quixotic efforts.

For these reasons, D.R. Horton's prohibitions against joint, class, and collective actions plainly violate the NLRA, as they strike directly at the core of Section 7 – the right of employees to provide mutual aid and protection by engaging in concerted protected activity. The Board should therefore conclude that D.R. Horton's prohibition against any joint, class, or collective legal action violates Sections 7 and 8(a)(1) of the NLRA.

II. The Supreme Court's Decision in *AT&T Mobility* Does Not Create Any Meaningful Conflict Between the NLRA and the FAA

In its May 6, 2011 Supplemental Brief at 2-3, D.R. Horton contended that *AT&T Mobility*, rather than supporting the Acting General Counsel's analysis, instead broadly permits employers to forbid their workers from participating in any joint, class, or collective actions in any forum. Nothing in the Court's *AT&T Mobility* decision supports such an expansive reading.

AT&T Mobility was a consumer case, not an employment case. Therefore, as a threshold matter, it could not possibly have addressed or resolved any questions about the Board's authority under the NLRA or about the scope of Section 7.

The question presented in *AT&T Mobility* was whether the Federal Arbitration Act of 1925 ("FAA"), 9 U.S.C. §1 *et seq*., preempted state laws of contract unconscionability to the extent those laws were applied to invalidate class action prohibitions in FAA-covered consumer

arbitration agreements. The 5-4 majority held that the FAA did have such preemptive effect, concluding that application of state unconscionability law to require class arbitration in the face of a direct contractual prohibition would "stand as an obstacle to the accomplishment of the FAA's objectives" – specifically, the implicit goals of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." 131 S.Ct. at 1748. At the same time, however, the Supreme Court explained that nothing in the language or purposes of the FAA was inconsistent with class arbitration per se, and it reiterated that consensual class arbitrations would still be permitted under the FAA. *Id*. at 1751; *see also* SEIU Amicus Br. at 8 n.5; *Jock v. Sterling Jewelers*, __ F.3d __, 2011 WL 2609853 (2d Cir. 2011) (approving class arbitration post-*AT&T Mobility*).

No preemption issue arises in this case under the NLRA, of course, because under the Supremacy Clause of the United States Constitution the preemption doctrine only applies where a conflict exists between federal law and inconsistent *state* law. Although the FAA may preempt state laws that are contrary to the FAA's language, purposes, or objectives, *see, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1987); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987), it is well established that one federal statute (like the FAA) cannot preempt another federal statute (like the NLRA), even if an actual, direct conflict exists between the two federal statutes. *See Felt v. Atchison, Topeka, & Santa Fe Ry. Co*., 60 F.3d 1416, 1418-19 (9th Cir. 1995) ("[P]reemption doctrine derives from the Supremacy Clause of the Constitution and concerns the primacy of federal laws. As defendant's motion concerns the interrelationship of two federal laws[,] preemption doctrine *per se* does not apply.").

Where a case involves rights and obligations under two federal statutes, and a question

arises concerning a potential conflict between those two statutory schemes, the relevant inquiry is not one of "preemption," but of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and should never be presumed. *See, e.g.*, *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention to repeal must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Id*.; *see Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("When two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective."). In those rare cases in which two federal statutes are in "irreconcilable conflict," moreover, it is the *later*-enacted statute – in this case the NLRA – that must be found to have impliedly repealed any inconsistent provisions in the *earlier* statute – the 1925 FAA. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Thus, to the extent any actual conflict exists between the FAA and the NLRA – which, for the reasons set forth below, it does not – the proper question for the Board to address would be whether the two statutes can be reconciled; and, if not, the NLRA must be found to have impliedly repealed any inconsistent provisions in the earlier enacted FAA, not vice versa.

There are several reasons why no conflict actually exists between the FAA and Section 7 of the NLRA (which means there should be no need for the Board to attempt to reconcile any differences or to determine whether Congress impliedly repealed the former through its enactment of the latter). First, of course, there is no express conflict between the FAA and Section 7. The FAA does not even mention class actions or joint actions, let alone prohibit them; and the U.S. Supreme Court and other courts have long recognized that arbitrators *can* adjudicate

class actions (and, of course, joint or consolidated actions) that are properly presented to them, using the provisions and procedures of the FAA and its judicial review provisions. *See, e.g., Keating v. Southland Corp.*, 31 Cal.3d 584, 612, *rev'd on other grounds*, 465 U.S. 1 (1984); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Sterling Jewelers*, 2011 WL 2609853 at *12-13; *see also* American Arbitration Association, Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562 (identifying dozens of cases that the AAA has arbitrated on a class or collective action basis in recent years). Indeed in *AT&T Mobility* itself, the Supreme Court acknowledged that consensual class arbitrations are permitted under the FAA. 131 S.Ct. at 1751

Second, Section 2 of the FAA, commonly referred to as the FAA's savings clause, explicitly incorporates generally applicable defenses to contract enforcement, as it provides that any arbitration agreement may be held invalid in whole or in part under any "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Because any contract term that violates Section 7 of the NLRA is legally invalid and unenforceable as a matter of federal law, *see, e.g.*, *First Legal Support Serv.*, 342 NLRB 350, 362 (2004) (adopting decision of ALJ), FAA §2 precludes the enforcement of such unlawful contract terms – even where, as here, the term has been inserted into a mandatory arbitration agreement covered by the FAA. This reading of the FAA is entirely consistent with the Supreme Court's seminal decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which not only quoted FAA §2 in discussing which arbitration provisions may be enforceable and which may not, but which also made clear that challenges to arbitrability could rest on other federal statutes besides the FAA. *See* 500 U.S. at 26; *see also Doctor's Associates*, 517 U.S. at 684-85, *quoting Perry*, 482 U.S. at 493 n.9. We

have not found any case in which any court has construed the FAA as precluding the enforcement of substantive statutory rights under federal law – and there is no reason why rights under Section 7 of the NLRA should be treated with any less respect than rights under other federal statutes.

Consistent with the express language of FAA §2, federal and state courts after *Gilmer* have not hesitated to invalidate arbitration provisions that conflict with other federal laws, including other federal worker protection statutes. Many courts, for example, have invalidated provisions in arbitration agreements that limit available remedies in violation of Title VII and similar employment statutes.[3/] The FAA's general policy of encouraging the enforcement of consensual arbitration agreements according to their terms has never prevented courts from invalidating specific provisions in arbitration agreements that conflict with other federal statutes – nor could it, under FAA §2 and *Gilmer*, or those other federal statutes themselves. Quite simply, Congress in the FAA did not purport to limit its ability to create specific substantive rights in later-enacted statutes.

Even assuming there were some limited circumstances in which the explicit protections of Section 7 created a potential for conflict with the underlying objectives of the FAA, the

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[3/] *See, e.g., Spinetti v. Service Corp. Intern.*, 324 F.3d 212, 216 (3d Cir. 2003) (holding that provision requiring the splitting of arbitration costs "r[an] counter to statutory provisions under Title VII and [ADEA] that permit an award of attorney's fees and costs to a prevailing party"); *Morrison v. Circuit City Stores, Inc*., 317 F.3d 646, 670 (6th Cir. 2003) (en banc) (holding, in "reconcil[ing]" requirements of civil rights statutes with the FAA, that cost-splitting and limitation-of-remedies provisions were unenforceable because requiring plaintiff "to forego her substantive rights to the full panoply of remedies under Title VII . . . would . . . contravene Congress's intent to utilize certain damages as a tool for compensating victims of discrimination and for deterring employment discrimination more broadly"); *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002) (provision in arbitration agreement between employee and employer, stating that each party "shall pay its own costs and attorneys' fees, regardless of the outcome of the arbitration," was unenforceable because provision denied employee remedy authorized by Title VII.).

Board's obligation in construing and applying the NLRA would at most be to consider whether the language and purposes of the NLRA could fairly accommodate those other statutory objectives. *See Neighborhood Ass'n Of The Back Bay, Inc. v. Fed. Transit Admin*, 463 F.3d 50, 59 (1st Cir. 2006) (observing that agencies must "articulate the pertinent policies, and . . . reconcile the policies of potentially conflicting statutes" and affirming agency's manner of reconciling certain historical preservation statutes with the ADA); *see also, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)); *cf. Morton*, 417 U.S. at 551 (before finding an implied repeal, court must attempt to reconcile the seemingly conflicting statutes). Any such inquiry would have to take into account the relative strength of the potentially conflicting policies as well as how explicitly they are stated and how directly they conflict. The Board's obligation to accommodate other statutory concerns should be at its weakest where the alleged conflict involves concerns that are central to the NLRA yet only implicit or of limited scope under the other statutory scheme. *Sure-Tan,* 467 U.S. at 893-94.[4/]

Section 7 effectuates the declared policy of the United States to protect "the exercise by

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[4/] In the few cases in which the Supreme Court has required the Board to tailor the NLRA's statutory remedies to accommodate the requirements of another statutory scheme, it has always found a direct statutory conflict and has required accommodation because the Board's proposed remedy would have resulted in a violation of an explicit – and in some instances, criminal – provisions of another statute. *See Sure-Tan*, 467 U.S. at 902 (Board must condition backpay remedy on legal readmittance to United States because INA explicitly bars unlawful entry); *Southern Steamship Co.*, 316 U.S. at 43 (Board's remedy "ignore[d] the plain Congressional mandate that a rebellion by seamen against their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny"); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-50 (2002) (backpay could not be awarded to undocumented immigrant employee as it would encourage violations of Immigration Reform and Control Act's "central" policy against employment of undocumented immigrants). There is no such explicit or direct conflict with the FAA in this case.

workers of full freedom of association [and] self-organization . . . for the purposes of . . . mutual aid or protection." 29 U.S.C. §151. This policy reflects Congress's central goal of guaranteeing the right of employees, union and non-union alike, to engage in concerted activity for their and their co-workers' mutual aid and protection. *See N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937) (Section 7 right is "fundamental"); *Vic Tanny Intern., Inc. v. N.L.R.B.*, 622 F.2d 237, 241 (6th Cir. 1980). Congress first articulated this important national labor policy of protecting employee concerted activity for mutual aid or protection even prior to the passage of the NLRA, in the 1932 Norris-LaGuardia Act, which stated Congress' intent that workers must be free "from . . . interference, restraint, or coercion . . . in . . . concerted activities for . . . mutual aid or protection," 29 U.S.C. §102, and further provided that any "undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States." 29 U.S.C. §103.

By contrast, although the Supreme Court has found that Congress's unstated purposes in enacting the FAA included encouraging the enforcement of consensual arbitration agreements and streamlining consensual dispute-resolution procedures, nothing in the FAA expressly guarantees or codifies those generalized principles, and certainly nothing in the FAA suggests that Congress ever intended to prevent workers from pursuing workplace claims in concert with their co-workers – which is the right Congress enshrined in both the 1932 Norris-LaGuardia Act, 29 U.S.C. §102, and the 1935 NLRA, 29 U.S.C. §157.[5/]

[5/] At the time of the FAA's enactment in 1925, the FAA did not even cover the only workers over whom Congress had Commerce Clause jurisdiction – and thus the constitutional power to protect through federal employment legislation. *See* 9 U.S.C. §1 (1925); *Circuit City v. Adams*, 532 U.S. 105, 120-21 (2001).

While the Supreme Court in *AT&T Mobility* concluded that the goals of facilitating enforcement and streamlining dispute resolution were *implicit* in the FAA, 131 S. Ct. at 1748-49, it never gave any indication that Congress intended either goal to be absolute. Nor could it have so concluded, given the Court's acknowledgment in *AT&T Mobility* that both goals had built-in limitations under the FAA (even without regard to any inconsistency between those goals and with later-enacted statutory rights). The Court noted, for example, that FAA §2 itself limited the courts' power to enforce private arbitration agreements containing otherwise legally unenforceable terms, and that nothing in the FAA was meant to altogether preclude class arbitration (let alone class arbitration *and* joint arbitration, as here), 131 S. Ct. at 1751.[6/] Consequently, any inquiry into whether the FAA placed implied limits on Section 7's clear and expressly stated purposes should take into account that Congress has *already* placed limits, recognized by the Supreme Court, on the potential scope of the FAA's implied statutory objectives.

Any assessment of potential conflicts between the NLRA and FAA should also take into account three other factors that demonstrate the limited nature of the asserted conflict.

First, whatever conflicts may arise between the NLRA and the FAA can only come into play *after* an employer has already committed an unfair labor practice by violating Sections 7 and

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[6/] It bears emphasis that D.R. Horton's workplace policy prohibiting all joint, collective, and class actions is far broader than the more limited prohibition against consumer class actions at issue in *AT&T Mobility*. While the Supreme Court identified some procedural aspects of Rule 23 consumer class actions that, absent the consent of the parties, might be deemed inconsistent with the FAA's goal of ensuring speedy and efficient adjudication of commercial disputes, *see* 131 S. Ct. at 1749, nothing in *AT&T Mobility* gives any indication that joint actions or collective actions (*e.g.,* opt-in actions under the Fair Labor Standards Act, Age Discrimination in Employment Act, or other similar statutes, *see* SEIU Amicus Br. at 8 n.5) create any such potential for conflict.

8(a)(1). As we have already explained, an employer first violates Section 8(a)(1) as soon as it promulgates a workplace policy prohibiting employees from pursing joint, class, or collective actions, even before it obtains executed individual mandatory arbitration agreements. *See supra*, at 5-7. It should make no difference, for purposes of Sections 7 and 8(a)(1), whether a particular worker submits to the unlawful new policy by signing the required agreement, or instead responds to the unlawful policy by quitting his job or withdrawing his application. In either case, the employer's announcement of the unlawful policy itself violates Section 8(a)(1), even though that violation is an ongoing one that continues for as long as the employer requires obedience to its unlawful prohibition.[7/] Surely it cannot be a defense to a Section 8(a)(1) charge that the employer, after committing a violation of Section 7, was then able to coerce its workers into signing an agreement that purported to "waive" the Section 7 rights it had already violated.

The second factor that bears on the limited weight to be given the FAA's unstated policy objectives in determining the proper application of Section 8(a)(1) is that in many NLRA-covered workplaces, the FAA does not even apply. Under D.R. Horton's approach, the fact that *some* class action prohibitions might implicate *some* of the FAA's unstated objectives would require the Board to abandon Section 7's protections for *all* NLRA-covered workers. Yet as a matter of national labor policy, it makes sense for the Board to adopt a construction of Section 7

[7/] *See, e.g., Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) (employer violates Sections 7 and 8(a)(1) by telling prospective employee during employment interview that she must sign document agreeing not to join a union, even if the document was never provided or executed: violation occurs when employee "could reasonably have anticipated that her future employment depended on whether she refrained from union activity, regardless of whether the pledge . . . was reduced to writing."); *Newport News Shipbuilding*, 233 NLRB 1443, 1451 (1977) (decision of ALJ, affirmed by Board, that maintenance of a policy prohibiting Section 7 activity is a "continuing violation").

that applies uniformly to all employees covered by the Act, and does not depend in its application on whether a particular employee happens to have signed an FAA-covered arbitration agreement. *Cf. Fisher Prods. Co.*, 114 NLRB 161, 162 (1955) ("We think our rules should be given a single, uniform interpretation, rather than 48 different interpretations depending on the State in which transactions arise.").

There are several categories of workers covered by the NLRA who either are not subject to the FAA at all or whose potential workplace claims cannot be made subject to a mandatory pre-dispute employment agreement. Since 1925, the FAA has excluded from the scope of its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1; *see Circuit City,* 532 U.S. at 116-19 (explaining intended scope of §1 exclusion). In more recent years, Congress has enacted a series of statutes carving out additional categories of workers and claims from the FAA.[8/] The

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[8/] *See, e.g.*, Wall Street Reform and Consumer Protection Act of 2010, 18 U.S.C. §1514A(e) (predispute arbitration agreements cannot be applied to claims by whistleblowers who disclose violations of Sarbanes-Oxley Act) and 7 U.S.C. §26(n)(2) (predispute arbitration agreements cannot be applied to claims by whistleblowers who disclose violations of Commodity Exchange Act); Federal Rail Safety Act (enacted as part of the Implementing Recommendations of the 9/11 Commission in 2008), 49 U.S.C. §20109 (employers may not require binding arbitration of whistleblower disputes with railway employees); Surface Transportation Assistance Act (enacted as part of the Implementing Recommendations of the 9/11 Commission in 2008), 49 U.S.C. §31105 (employers may not require binding arbitration of whistleblower disputes with commercial motor carrier employees); National Transit Systems Security Act (enacted as part of the Implementing Recommendations of the 9/11 Commission in 2008), 6 U.S.C. §1142 (employers may not require binding arbitration of whistleblower disputes with public transit employees); American Recovery and Reinvestment Act of 2009, P.L. 111-5 (2009), §1553(d) (employers who accept stimulus funds may not require binding arbitration of whistleblower disputes with employees); Military Payday Loan Law of 2007, 10 U.S.C. §987 (contracts to loan money to members of the military or their families that contain mandatory arbitration clauses are void); Fair Contracts for Growers Act of 2008, 7 U.S.C. §210 (requiring producers or growers to enter into predispute arbitration agreement as a condition of entering into a livestock or poultry (continued...)

increasing number of statutory carve-outs from the FAA provides further reason why the unstated policy objectives underlying the FAA should be given little, if any, weight in the balancing of competing statutory interests.

Finally, to the extent any statutory conflict actually exists between the NLRA and the FAA on the facts of this case, it has been entirely manufactured by D.R. Horton, which has unilaterally *chosen* to prohibit all concerted legal activity in *every* forum potentially available to its employees – *i.e.*, in court as well as in arbitration. There is no reason why D.R. Horton or any other employer could not have prohibited class actions in arbitration only (thus preserving arbitration as a forum for speedy resolution of individual actions) while permitting its workers to pursue joint class and collective actions in court, as for example the national brokerage exchanges require. *See* SEIU Amicus Br. at 15 & n.9. *Cf. O'Charley's Inc.*, Case No. 26-CA-19974 (Div. of Advice April 16, 2001), 2001 WL 1155416 (N.L.R.B.G.C.) at *4. A ruling by the Board that D.R. Horton cannot impose an across-the-board prohibition against class and collective actions in *all* forums – which is the relief the Acting General Counsel is appropriately seeking – would not preclude D.R. Horton in the future from continuing to require arbitration of individual claims, as long as it provides a truly meaningful alternative forum (such as court) for adjudicating concerted action claims. Nothing in the NLRA – or the FAA – prevents an employer from limiting arbitration to individual claims only, while preserving its employees' Section 7 rights to prosecute their joint, class, and collective actions in court.

[8/] (...continued)
contract is an unlawful practice under the Packers and Stockyards Act); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, 15 U.S.C. §1226 (automobile manufacturers may not require mandatory arbitration of disputes with automobile dealers).

In sum, *AT&T Mobility* does not help D.R. Horton. There is no conflict between Section 7's explicit protection of an employee's right to engage in protected concerted activity and the unstated "goals" or "purposes" of the FAA. Even if some potential for conflict existed and even if the Board were required to balance the respective interests protected by the two statutes, the proper result would be for the Board to enforce the NLRA's core Section 7 right, thus protecting the workers' ability to engage in concerted activity for their mutual aid and protection.

CONCLUSION

For the foregoing reasons, the Board should reverse the ALJ's decision and should hold that D.R. Horton's prohibition against joint, class, and collective arbitrations violates Sections 7 and 8(a)(1).

Dated: July 27, 2011

Respectfully submitted,

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CHANGE TO WIN
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC. and MICHAEL CUDA, an individual	NLRB Case No. 12-CA-25764

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, the foregoing document

Brief Amicus Curiae of Change to Win
In Support of General Counsel's Exceptions

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